

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
2006 Quadrennial Regulatory Review - Review of)	MB Docket No. 06-121
the Commission's Broadcast Ownership Rules and)	
Other Rules Adopted Pursuant to Section 202 of)	
the Telecommunications Act of 1996)	
)	
2002 Biennial Regulatory Review - Review of the)	MB Docket No. 02-277
Commission's Broadcast Ownership Rules and)	
Other Rules Adopted Pursuant to Section 202 of)	
the Telecommunications Act of 1996)	
)	
Cross-Ownership of Broadcast Stations and)	MM Docket No. 01-235
Newspapers)	
)	
Rules and Policies Concerning Multiple)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations in Local)	
)	
Definition of Radio Markets)	MM Docket No. 00-244

INITIAL COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

The Network Affiliate Stations Alliance ("NASA"), a coalition representing some 600 local television stations affiliated with the ABC, CBS, and NBC Television Networks,¹ submits these comments in response to the Commission's Further Notice of Proposed Rulemaking, specifically (1) paragraph 34-36, asking about the Commission's authority to "retain, modify or eliminate the UHF discount" and about the public policy desirability of its

¹ NASA participated in the earlier proceeding, in opposition to the Commission's raising the national cap – an issue subsequently mooted by Section 629 of the Consolidated Appropriations Act of 2004, Pub. L. No. 108-109, § 629, 118 Stat. 3 (2004). NASA made clear that it took no position on the Commission's reforming its other broadcast ownership rules and consistently pointed out that retaining the national cap and liberalizing the other rules both serve the goal of localism. As described below, NASA has previously commented on the UHF discount and the dual network rule, which are the two issues it addresses in this pleading.

taking any of these steps² and (2) paragraph 33, asking about retention of the Commission's rule prohibiting the combination of any two of the four major networks – the so-called dual network rule.³

NASA submits that the Commission has the authority to deal with the UHF discount issue, and that it should exercise that authority by sunseting the discount for the major networks but grandfathering their existing level of ownership for purposes of calculating their reach under the 39% national cap rule. The Commission should also retain the dual network rule for the four major networks.⁴

I. THE COMMISSION SHOULD SUNSET THE UHF DISCOUNT FOR MAJOR NETWORK O&Os AND GRANDFATHER EXISTING HOLDINGS FOR PURPOSES OF THE NATIONAL CAP.

In the analog environment, the Commission discounted by 50% the population a UHF station's Designated Market Area ("DMA") because in the analog environment UHF signals generally provide substantially poorer coverage than analog VHF stations. In the new digital environment, however, this disadvantage will disappear. Because many major network owned-and-operated stations operate on VHF channels in the analog environment and, after the digital transition on February 17, 2009, will operate on UHF channels, retention of the UHF

² 2006 *Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules*, Further Notice of Proposed Rulemaking, FCC 06-93, MB Docket No. 06-121, at ¶ 35 (rel. July 24, 2006) ("Further Notice"). The Commission has not proposed to eliminate the UHF discount for licensees other than the four major networks.

³ The Commission's Further Notice points out that no party challenged retention of this rule in the *Prometheus* case. See *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

⁴ NASA wishes to emphasize that the affiliates depend on the networks for high quality news, sports and entertainment programming. The networks and affiliates face many challenges together, and they seek cooperatively to address these challenges, some of which are threats and some of which are opportunities. Both parties to this unusual, complicated, shifting and ultimately productive relationship believe that the public derives unrivaled benefits from the mix of national and local service that this partnership provides.

discount would permit the major networks to increase their station holdings above the limits imposed by the 39% cap adopted by Congress in 2004.

But if the 50% UHF discount were eliminated without grandfathering, the networks' existing holdings would immediately exceed the 39% national cap because the coverage of their UHF stations markets would no longer be discounted by 50%. Accordingly, NASA supports elimination of the UHF discount for major network stations, but would grandfather the population reach of their present station holdings for purposes of the national cap rule.

A. The Commission Has The Authority to Adjust the UHF Discount.

In 2004, the Commission asked for comment on the scope of its authority with respect to the UHF discount.⁵ NASA submitted Comments and Reply Comments. Similarly, the Third Circuit in the *Prometheus* case acknowledged the issue, confirming that the Commission may decide the scope of its authority to modify or eliminate the UHF discount.⁶

In its various submissions to the Commission and the Third Circuit, NASA explained that Section 629 of the Consolidated Appropriations Act of 2004⁷ does not affect the Commission's authority to implement its decision to sunset the UHF discount for the major networks following the digital transition. NASA further pointed out that the enactment of Section 629 did not undercut that decision,⁸ and that, if anything, it indicated that Congress

⁵ Public Notice, *Media Bureau Seeks Additional Comment on UHF Discount in Light of Recent Legislation Affecting National Television Ownership Cap*, 19 FCC Rcd. 2599 (2004).

⁶ *Prometheus*, *supra*, at 397.

⁷ Pub. L. No. 108-199, 118 Stat. 3 (2004).

⁸ Section 629 expressly directed the Commission to change the ownership limit in its national television ownership rule from 45% to 39%. The statutory language did not reverse the Commission's decision to phase out the UHF discount for the big four networks at the time of (continued...)

approved the Commission's sunset decision. NASA also demonstrated that, as the Third Circuit observed, a contrary reading of Section 629 would undermine the integrity and effectiveness of the 39% national ownership limit imposed by Congress.⁹

In directing the Commission to make a specific change to its national television ownership limit (from 45% to 39%), Congress naturally used the terms of the Commission's regulation, then in effect, including the term "national audience reach limitation," in order to pinpoint that aspect of the Commission's ownership regulations that Congress wanted the Commission to alter. It does not follow, however, that Congress's use of the phrase "national audience reach limitation" was intended to freeze the meaning of that term forever. Principles of statutory interpretation, such as the presumption against repeals by implication¹⁰ and the presumption that Congress knows the law and therefore was aware of the Commission's sunset decision when Section 629 was enacted,¹¹ compel the opposite conclusion.¹² Moreover, the Commission has long been on record that Congress's use of the phrase "national audience reach

the digital transition, a decision with which no Commissioner disagreed. The Commission's sunset decision applies to "the stations owned by the top four broadcast networks (i.e., CBS, NBC, ABC and Fox)." *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules*, Report & Order, 18 FCC Rcd. 13620 at ¶ 591 (2003) ("2002 Biennial Review").

⁹ See *Prometheus*, *supra*, at 396.

¹⁰ See, e.g., *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) ("repeals by implication are not favored, ... and will not be found unless an intent to repeal is clear and manifest.").

¹¹ See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

¹² See Comments of the Network Affiliated Stations Alliance, MB Docket No. 02-277, at 6-9 (filed Mar. 19, 2004).

limitation” in the Telecommunications Act of 1996 did not divest it of authority to modify the UHF discount under its general rulemaking powers.¹³

Had Congress sought to divest the Commission of authority to modify the UHF discount in Section 629 or to reverse the Commission’s decision to sunset the UHF discount for major networks, it would have said so expressly. But Congress did not. Rather, Congress simply modified the 1996 Act by directing the Commission to set the television ownership cap at 39 percent of the national viewing audience and exempting rules relating to the 39 percent limitation from the quadrennial review process. Once the Commission issued its *2002 Biennial Review Order*, there was no “settled” or “longstanding” agency position in favor of retaining the UHF discount. Instead, the Commission’s position was that, upon completion of the digital transition, the UHF discount should sunset for stations owned by the four major networks.¹⁴

Subsequently, the Commission properly rejected a request by Fox, NBC, and Viacom to reconsider its decision to sunset the UHF discount for the four major networks. These networks argued that the underlying assumption of the Commission’s sunset decision – that the cap would be set at 45% – was no longer accurate, and that sunset would therefore result in forced divestitures. (NASA does *not* urge divestitures.) To the contrary, however, the

¹³ See *Broadcast Television National Ownership Rules*, Notice of Proposed Rulemaking, 11 FCC Rcd. 19949, 19950 (1996); *1998 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules*, Biennial Review Report, 15 FCC Rcd. 11058, 11079 (2000).

¹⁴ By urging the Commission to reconsider its decision to sunset the UHF discount in light of the 39% limit imposed by Congress, Fox, NBC, and Viacom implicitly conceded that the Commission had the authority to sunset the UHF discount. See Fox Entertainment Group, *et al.*, Comments Regarding the Status of the UHF Discount, MB Docket No. 02-277, at 10-12 (filed Mar. 19, 2004) (“Fox Comments”). See also Comments of Paxson Comms. Corp., MB Docket No. 02-277, at 15-16 (filed Mar. 19, 2004). Other aspects of the legislative history surrounding Section 629 indicate that Congress purposefully chose not to codify the UHF discount. See Comments of Hearst-Argyle Television, Inc., MB Docket No. 02-277, at 4-5 (filed Mar. 19, 2004).

Commission said that its decision to eliminate the discount was based on the fact that “the digital transition will largely eliminate the technical basis for the UHF discount because UHF and VHF signals will be substantially equalized.”¹⁵ As for avoiding divestitures, NASA has suggested and continues to suggest that grandfathering existing network-owned stations for purposes of the national cap rule would leave existing station combinations intact while preserving the integrity of the 39% cap.

In the earlier proceeding, Fox complained that the Commission’s sunset provision was unjustifiably “discriminatory.”¹⁶ But the Commission explained in defense of the sunset that retaining the discount for station group owners other than the four major networks would promote entry of new broadcast networks, making differential treatment appropriate. The Commission also concluded in the *2002 Biennial Review Order*, and Congress agreed, that localism – specifically concern about the networks’ incentive to prefer their own programming – justifies continued retention of a national television ownership cap.

II. THE REASONS FOR THE DUAL NETWORK RULE REMAIN APPLICABLE AND THERE ARE NO NEW REASONS FOR TERMINATING IT.

In 2001, after extensive analysis, the Commission concluded that retention of the dual network rule, insofar as it applies to ABC, CBS, Fox and NBC, continues to serve the public interest.¹⁷ In 2002, the Commission, pursuant to the biennial review process, asked for comment on retention of the rule.¹⁸

¹⁵ *2002 Biennial Review Order* at ¶ 591.

¹⁶ *Fox Comments* at 11.

¹⁷ *Amendment of Section 73.658(g) of the Commission’s Rules – The Dual Network Rule*, 16 FCC Rcd. 11114, 11131 ¶ 37 (2001).

¹⁸ *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules*, Notice of Proposed Rulemaking, 17 FCC Rcd. 18503 (2002). *See also 2002 Biennial Regulatory* (continued...)

As NASA explained in its 2003 comments and reply comments urging retention of the dual network rule,¹⁹ the rule serves the Commission's longstanding goals of competition, diversity and localism. It preserves *competition* by preventing further consolidation among the four major networks. It protects *diversity* by preventing further narrowing of the network pipeline that is the path for national programming to reach the general public. And it benefits *localism* by preventing mergers of the major networks that would further exacerbate the power the networks have over their affiliates.

The media environment is dynamic, characterized by fast-paced change. The networks, like other media players, have responded aggressively to these changes by strategies that have often involved vertical integration. As a consequence, their reach has increased, not decreased, since the 2001 and 2003 proceedings. There is no evidence that the major networks are in such a weakened condition in the new competitive landscape that an abandonment of the dual network rule would be justified. Nor are there any other developments that would justify permitting a merger of two of the four major networks.

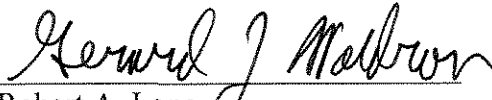
Review – Review of the Commission's Broadcast Ownership Rules, Report & Order, 18 FCC Rcd. 13620 (2003).

¹⁹ See Comments of NAB and NASA, MB Docket No. 02-277 (filed Jan. 2, 2003); Reply Comments of NAB and NASA, MB Docket No. 02-277 (filed Feb. 3, 2003).

NASA continues to support (1) the post-transition sunset of the UHF discount for the four major networks and grandfathering of their existing audience reach and (2) retention of the dual network rule as applied to the four major networks.

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